Federal Managers Association

Testimony
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Federal Employee Appeals Processes

Establishing a Commission to Recommend Improvements for the Federal Employees Appeals Process

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Chairman Jon Porter, Ranking Member Danny Davis and distinguished members of the House Government Reform Subcommittee on the Federal Workforce and Agency Organization:

On behalf of the nearly 200,000 managers and supervisors in the federal government whose interests are represented by the Federal Managers Association, allow me to thank you for the opportunity to present our perspective on the need for reforms in the employee appeals process and the draft legislation to establish a commission to review jurisdictional and procedural issues and make recommendations to Congress for improvement. We are pleased to offer our perspective and honored to be included in the establishment of a commission to study the employee appeals processes.

Established in 1913, FMA is the largest and oldest Association of managers and supervisors in the federal government. FMA originated in the Department of Defense, but has expanded to include the interests of supervisory professionals in some 35 different federal departments and independent agencies. We are a non-profit advocacy organization dedicated to promoting excellence in public service and creating an efficient and effective federal government.

I serve as the Vice President of FMA Chapter 88 in Watervliet, N.Y. where I manage organization development programs at Watervliet Army Arsenal just outside Albany, N.Y. I have an MBA in Human Resources with considerable experience in labor relations and quality programs. I served as an Equal Employment Opportunity compliance office in the manufacturing and health care industries for a number of years prior to my 18 years of federal service.

The established systems for employees to address grievances against a manager or agency official for discrimination, violation of a labor agreement, infringement of merit systems principles, whistleblower protections or other acts against the rights of employees are inconsistent in their ability to adequately respond to a complaint in a timely manner and weed out frivolous claims. Between the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), the Federal Labor Relations Board (FLRA), and the Office of Special Counsel (OSC), employees have a broad range of avenues available to them to take appeals actions to independent organizations established solely to ensure their rights as civil servants are protected. We do not dispute the merits of

these agencies and believe in them as independent bodies established to help maintain the integrity of federal workforce.

At the hearing before this Subcommittee on November 9, 2005, there were discussions about an apparent disparity in the ability of those decision-making bodies to respond quickly and offer employees speedy due process in their claims of wrongdoing against a manager. While some agencies seemed to work as models of efficiency, others presented broken systems and excessive backlogs. Regardless, the point was clearly made that managers and supervisors remain subject to a system that forces them to question making decisive management decisions against a problem employee for fear of retaliation in the federal employee appellate system.

As was pointed out in the testimony of the Senior Executives Association (SEA), employees can file unmeritorious claims and maneuver through the appeals processes for years due to the delays, backlog, and lack of a streamlined process for claims. In the meantime, managers are passed over for career-advancing opportunities in the face of mostly unmeritorious claims. More importantly, meritorious claims are left lingering for years while an employee works in an environment with a boss who has taken unwarranted action against them. Most notably the EEOC process demonstrates the perfect example of the opportunities for an employee to seek retribution against a manager by filing frivolous claims.

Under the current EEOC process, an employee completes a form alleging the category of discrimination that he/she believes has occurred. The EEOC counselor must then accept this in-take form and begin an investigation without requiring any information from the employee on what occurred and without the authority to reject obviously baseless claim such as an employee claims discrimination based on a disability without any documentation of having a disability. Once the counselor completes the interviews, he/she reports back to the employee the findings. If the counselor determines that the interviews do not document a case of discrimination based on the initial round of investigation, the employee has three options: drop the complaint, pursue the complaint formally with the EEOC or file a grievance. For an employee unsatisfied with their manager or supervisor's response to their conduct or performance, this could go on for quite sometime.

Should the EEOC counselor determine there may be discrimination based on the initial round of interviews, the case is formally referred to the EEOC. Due to the enormous volume of cases, however, the EEOC managers often put pressure on the agencies to consider settlement and avoid adding to the backlog. In one case of one of our members, an employee was hired for a two-year temporary appointment with the explicit contractual understanding that the employee must meet acceptable quality and quantity levels of performance to be eligible for a permanent assignment. The temporary employee consistently fell short of his required standards of performance and was not offered a permanent position of employment. At which point, the temporary employee filed an EEO complaint alleging race discrimination. EEO pressured the agency to make a settlement offer because of the considerable backlog of cases. So, the Agency made an offer of $500. The claimant turned down the settlement, and the agency eventually won the case before the EEOC. This scenario demonstrates a dangerous precedent for future frivolous claimants.

According to the 2005 Annual Report of the Equal Employment Opportunity Commission, the EEOC seems to be moving the right direction to improve the timeliness of investigations, hearing receipts, and merit decisions. The number of timely investigations improved from 42% of cases being investigated on time in 2004 with an average of 280 days to 55% being investigated on time in 2005 for an average of 237 days – the lowest average days for investigation in the past five years. We commend the Commission for their efforts to improve the process, address the backlog and reduce the overall timeliness of responses. However, this is still well above the required 180 days for an investigation to be completed and a report to be issued to the complainant.

Even more troublesome is the inability to head off frivolous claims from being taken through the process. Of the 22,974 cases closed in 2005, only 345 were found to have discrimination. That means 1.5% of the cases were found to be meritorious in their claims of wrongful action, which is slightly more than the 1.3% of cases in 2004 that were found to have the same statistics. Moreover, roughly 20% of claims were settled out of the system, but as we explained in our example that could possibly be the result of a backlogged system needing relief and not the indication of legitimate claims being quelled. Based on those numbers, of the 18,017 EEO complaints filed this year roughly 270 will likely be found to have legitimate discrimination, and under the current time constraints they could take up to six years to be settled.

The other independent agencies do not seem to have the same backlog or process problems. The Merit Systems Protection Board is closer to the mark in their timeliness of processing claims and the percentage of decisions rendered finding violations of the merit systems principles. On average, the Board renders decisions within 100 days of filing and supports the actions of managers and supervisors 80% of the time. Furthermore, we do not perceive any glaring problems with the timeliness of FLRA arbitration decisions or the OSC investigation, review and decision making processes.

A proposal has been offered by the Senior Executives Association (SEA) to address this disparity through the consolidation of the various independent appellate agencies into one Federal Employee Appeals Court, which would ideally allow for better triaging of claims filed against a manager and faster decision making of frivolous actions that clog up the system. We support the spirit of the proposal by the SEA and believe that something must be done to address the problem managers, supervisors and employees face with a broken appeals process. However, we remain uncertain that the major federal agency reorganization proposed by the SEA to create a Federal Employee Appeals Court adequately addresses the problems with the current processes or simply consolidates them into a larger federal agency. We are unsure whether the issue is remedied through addressing a lack of proper authorization and funding for the necessary staff to investigate, review and decide on a claim or if the overarching issue is one of a faulty process needing major legislative reforms.

It is clear to us, however, that the entire appeals process offers too many options to employees looking to file frivolous claims against managers trying to address poor conduct, under performance or other problems with employees. The EEOC process must be streamlined and more stringent standards must be placed on claims filed by employees. We also believe that managers' rights need to be taken into consideration due to the excessive numbers of frivolous claims determined each year by the EEOC decisions. As we consider establishing a Commission to study the entirety of the employee appeals process, there must be a focus on the need for someone to have the initial authority to dismiss allegations of management wrongdoing when there is clearly no merit to the allegation and allow only an appeal of that decision by one other body.

The legislation proposed by Chairman Porter to establish a Commission to review the jurisdictions involved in the federal employee appeals process, any overlap between independent agencies, the time and process involved for each complaint filed, and any barriers to the process presents a thoughtful and deliberate balance in the effort to address these issues. The legislation would require within one year's time recommendations on structural and process changes, any consolidation reforms, independent versus internal agency investigations of claims, the process time, and better ways to address mixed cases, encouraging use of alternative dispute resolution, and the overall ability to improve public reporting. This will allow members of the Commission and affected parties the opportunity to properly review the SEA proposal in the light of a thorough assessment of all the federal employee appeals outlets and their mission.

The proposal of a Commission to study the issue takes us a step forward in addressing the failures of the federal employee appeals process and opening the door to understand the proper solution to remedy the problem. For too long, managers, supervisors and employees have suffered at the hands of lengthy processes, broken systems, disconnected options and eventually unsatisfactory decisions. For the manager working with an employee who is a frequent filer or an employee working with a discriminatory supervisor, resolution must come at a quicker pace.

We support the efforts of Chairman Porter and believe this legislation would take us a step closer to fixing the broken system that currently exists in the federal employee appeals process. Any reforms can then be discussed in an open format at later hearings and a dialogue can be opened to consider various reform options. It is critical that the process be improved. The managers and employees currently subjected to it deserve nothing less.